Standard Chartered Bank v KTS Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–10 OF 2004(A)
ABDUL MALEK AHMAD PCA, STEVE SHIM CJ (SABAH & SARAWAK) AND SITI NORMA YAAKOB FCJ
12 JULY 2006

Insurance — Fire insurance — Construction of policy — Whether beneficiary held insurance money on trust for third party — No intention to create trust at time of execution of policy — Whether policy covered third party's goods thus third party as owner of goods was entitled to the insurance money

Trust and Trustees — Trusts — Existence of — Fire insurance covered goods of third party for benefit of beneficiary bank — Whether beneficiary held insurance money on trust for third party — No intention to create trust at time of execution of policy — Whether policy covered third party's goods thus third party as owner of goods was entitled to the insurance money

On 6 November 1984, a company known as Lampak (M) Timber Sdn Bhd ('Lampak') borrowed monies from the appellant bank ('the Bank') as capital to manage its sawmilling business and by way of security, Lampak created fixed and floating charges of all its assets by way of a debenture. By cl 9(i)(a) of the debenture, both Lampak and the Bank had to insure all materials, stocks-in-trade, other properties and assets covered by the debenture against loss or damage by fire. Both parties executed a joint fire insurance policy dated 4 March 1985, with Hong Leong Assurance Sdn Bhd ('Hong Leong') for the insured sum of RM1m. The insured sum was subsequently revised to RM2m. At all material times, Lampak was in the business of buying and selling sawn timber at a sawmill located at the 11¼ mile Jalan Kuala Kangsar, Chemor, Perak, which was owned by another company known as Foong Seng Fuat Sawmill Sdn Bhd ('Foong Seng Fuat'). It was the respondent's case that before 14 June 1985, it had entered into various contracts with Lampak for the purchase of sawn timber to the total value of RM597,152.39 and that amount had been tendered to Lampak. However before Lampak could make delivery, a fire broke out at the sawmill on 14 June 1985, that completely destroyed all the sawn timber purchased by the respondent. The Bank and Lampak took an action against Hong Leong claiming RM2m under the fire insurance policy. By a consent judgment, Hong Leong paid the Bank and Lampak RM700,000 in full and final settlement of their claims of which RM607,018.49 was apportioned to the Bank and the balance of RM92,981.51 to Lampak. Following this, the respondent filed an action and obtained judgment against Foong Seng Fuat and Lampak (the second suit) for non-delivery of the sawn timber and claiming the return of the sum of RM597,152.39 being the purchase price paid by the respondent to Lampak for the sawn timber. The respondent only managed to recover RM57,956.56 from Lampak

leaving a balance of RM539,195.83 ('the balance sum') still due and owing to the respondent. Lampak and Foong Seng Fuat had since been wound up.

In this suit, the respondent sought to trace the balance sum due from Lampak to the insurance money in the hands of the Bank on the basis that the Bank held such unpaid balance on trust for the respondent and consequently sought its return with interests. In the High Court, the respondent's claim for a declaration that the Bank held a stated amount of monies as a trustee for the respondent was dismissed with costs. The Bank's submitted that: (1) the respondent was not entitled to the insurance money as the policy did not cover the respondent's sawn timber; (2) the respondent was not insured under the policy as the Bank and Lampak never intended to insure the respondent's sawn timber; and (3) the policy was meant to cover the Bank's mortgage interest only.

The Court of Appeal found that the Schedule in the insurance policy made provisions for the sawn timber purchased to be held on trust for the respondent and as such the respondent had a beneficial interest on the insurance money paid to the Bank. The Court of Appeal then disagreed with the High Court, overturned the decision of the latter and entered judgment for the respondent.

Subsequently this court granted leave to the Bank to pose the following questions of law:

(1) Whether under Malaysian law a trust may arise and be relied on as a cause of action against another party when the following requirements are absent:

   (a) There is no intention to create a trust for any person at the time of the execution of the Insurance Policy;

   (b) The element of certainty of subject matter is not proven;

   (c) The identity of the beneficiary of the trust is absent at the material time of execution of the contract of insurance.

(2) Whether evidence of an oral agreement with a third party can in the context of law of trust and equity be adduced to contradict and deny the existence of a clear written agreement.

Held, dismissing the appeal:

(1) What the policy covers must be gathered from the terms of the policy and if it insures third party goods, the insurance money cannot be kept by the insured who suffered no loss but must be paid to the third party who suffered the loss (see para 32). From the reading and understanding of the phrase 'held in trust' in the Schedule coupled with the Contract Price Clause, the goods insured must necessarily include a third party's goods, ie the respondent's sawn timber (see para 35).

(2) Since the Bank had no insurable interest over the property, it had chosen not to take a separate policy. Thus when the property was destroyed by the fire and the sum paid to the Bank, a trustee, it should hold such sum of money on trust (see para 43).

(3) The policy did not cover the Bank's interest as a mortgagee, despite the presence of the Mortgagee Clause in the policy. Firstly the Bank's interest as a mortgagee was not stated in the Schedule. Secondly the heading immediately above the Mortgagee Clause made a qualifying statement that read as follows. 'The following clauses and warranties are only applicable when specified in the Schedule.' Since the Mortgagee Clause was not specified in the Schedule nor included in the list, it did not form part of the policy (see paras 43–45).

(4) As a debenture holder, the Bank became Lampak's secured creditor but it must be emphasized that what was pledged as security by Lampak was its assets and not the respondent's sawn timber. The insurance money represents the goods destroyed by the fire and only the owner of such goods is entitled to the insurance money as the insurance policy is an indemnity (see para 59); *Maurice v Goldsbrough Mort and Co Ltd* [1939] 3 All ER 63 followed.

(5) Since the insurance money did not belong to Lampak but to the respondent as the owner of goods that were destroyed by the fire, the payment of the insurance money to the respondent was not to be a preferential payment of a debt due to an unsecured creditor (see para 60). Therefore the court gave a positive yes to Question (1) and a negative no to Question (2) (see para 61)

[Bahasa Malaysia summary

Pada bulan November 1984, sebuah syarikat dikenali sebagai Lampak (M) Timber Sdn Bhd ('Lampak') telah meminjam wang daripada bank perayu ('Bank tersebut') sebagai modal untuk mengendalikan perniagaan kilang papannya dan melalui cagaran, Lampak telah membentuk cagaran-cagaran tetap dan terapung terhadap kesemua aset-asetnya melalui satu debentur. Menurut kl 9(i)(a) debentur, kedua-dua Lampak dan Bak tersebut hendaklah menginsuranskan semua bahan-bahan, stok dalam dagangan, hartanah lain dan aset-aset yang dilindungi oleh debentur itu terhadap kehilangan atau kerosakan akibat kebakaran. Kedua-dua pihak telah memasuki satu polisi insurans kebakaran bersama pada 4 Mac 1985, dengan Hong Leong Assurance Sdn Bhd ('Hong Leong') untuk menginsuranskan sejumlah RM1j. Jumlah yang diinsuranskan kemudiannya diubah kepada RM2j. Pada setiap masa matan, Lampak dalam perniagaan yang membeli dan menjual papan kayu balak di sebuah kilang papan yang terletak di Batu 11¼ Jalan Kuala Kangsar, Chemor, Perak, yang dimiliki oleh sebuah syarikat lain yang dikenali sebagai Foong Seng Fuat Sawmill Sdn Bhd ('Foong Seng Fuat'). Adalah kes responden bahawa sebelum 14 Jun 1985, ia telah memasuki beberapa kontrak dengan Lampak untuk belian papan kayu balak untuk nilai keseluruhan RM597,152.39 dan jumlah tersebut telah ditenderkan kepada Lampak. Bagaimanapun sebelum Lampak membuat penyerahan, satu kebakaran telah berlaku di kilan papan itu pada 14 Jun 1985, yang memusnahkan semua papan kayu balak yang dibeli oleh responden. Bank tersebut dan Lampak memulakan satu tindakan terhadap Hong Leong menuntut RM2j di bawah polisi insurans kebakaran itu. Melalui satu penghakiman persetujuan, Hong Leong telah membayar Bank tersebut dan Lampak RM700,000 penyelesaian penuh dan muktamad tuntutan mereka di mana sejumlah RM607,018.49 telah diagihkan kepada Bank tersebut dan baki sejumlah RM92,981.51 kepada Lampak. Berikutan itu, responden telah memfailkan satu tindakan dan memperoleh penghakiman

terhadap Foong Seng Fuat dan Lampak (guaman kedua) kerana ketakserahan papan kayu balak itu dan menuntut untuk dikembalikan jumlah RM597,152.39 yang merupakan harga belian yang dibayar oleh responden kepada Lampak untuk papan kayu balak itu. Responden hanya dapat balik RM57,956.56 daripada Lampak meninggalkan baki RM539,195.83 ('jumlah baki') yang masih tertunggak dan perlu dibayar kepada responden. Lampak dan Foong Seng Fuat telahpun digulungkan.

Dalam guaman ini, responden telah memohon untuk mengesan jumlah baki yang perlu dibayar daripada Lampak kepada wang insurans dalam tangan Bank tersebut berdasarkan yang Bank tersebut memegang baki yang tidak berbayar atas amanah untuk responden dan seterusnya memohon untuk pulangannya dengan kos. Bank tersebut telah berhujah bahawa: (1) responden tidak berhak terhadap wang insurans itu kerana polisi tersebut tidak melindungi papan kayu balak responden; (2) responden tidak diinsuranskan di bawah polisi tersebut kerana Bank tersebut dan Lampak tidak berhasrat untuk menginsuranskan papan kayu balak responden; dan (3) polisi tersebut bermaksud untuk melindungi kepentingan gadai janji Bank tersebut sahaja.

Mahkamah Rayuan mendapati bahawa Jadual dalam polisi insurans telah menetapkan peruntukan untuk papan kayu balak yang dibeli itu dipegang atas amanah untuk responden dan oleh itu responden mempunyai kepentingan benefisial terhadap wang insurans yang dibayar kepada Bank tersebut. Mahkamah Rayuan kemudian tidak bersetuju dengan Mahkamah Tinggi, mengubah keputusan Mahkamah Tinggi itu dan memasuki penghakiman bagi pihak responden.

Berikutan itu mahkamah ini memberikan kebenaran kepada Bank tersebut untuk mengemukakan beberapa persoalan undang-undang:

(1) Sama ada di bawah undang-undang Malaysia suatu amanah boleh timbul dan digunakan sebagai kausa tindakan terhadap pihak satu lagi apabila keperluan berikut tidak wujud:

   (a) Tiada niat untuk membentuk suatu amanah untuk sesiapa pada masa penyempurnaan Polisi Insurans itu;

   (b) Elemen ketentuan perkara pokok tidak dibuktikan;

   (c) Identiti benefisiari amanah tiada pada masa matan penyempurnaan kontrak insurans itu.

(2) Sama ada keterangan suatu perjanjian lisan dengan pihak ketiga boleh dalam konteks undang-undang amanah dan ekuiti dikemukakan untuk menyangkal dan menafikan kewujudan satu perjanjian bertulis yang jelas.

Diputuskan, menolak rayuantersebut:

(1) Apa yang polisi itu melindungi adalah berdasarkan terma-terma polisi itu dan jika ia menginsuranskan barangan pihak ketiga, wang insurans itu tidak boleh disimpan oleh penginsurans yang tidak mengalami apa-apa kerugian tetapi hendaklah dibayar kepada pihak ketiga yang mengalami kerugian itu (lihat perenggan 32). Berdasarkan pembacaan dan pemahaman ungkapan

A 'held in trust' dalam Jadual bersama Klausa Harga Kontrak, barangan yang diinsuranskan hendaklah termasuk barangan pihak ketiga, iaitu papan kayu balak responden (lihat perenggan 35).

(2) Memandangkan Bank tersebut tidak mempunyai kepentingan insurans terhadap hartanah itu, ia tidak memilih untuk mengambil polisi yang
B berasingan. Oleh itu apabila hartanah itu musnah dalam kebakaran dan jumlah yang dibayar kepada Bank tersebut, pemegang amanah, ia hendaklah memegang wang tersebut atas amanah (lihat perenggan 43).

(3) Polisi tersebut tidak melindungi kepentingan Bank tersebut sebagai penggadai janji, meskipun terdapat Klausa Penggadai Janji dalam polisi tersebut. Pertama,
C kepentingan Bank tersebut sebagai penggadai janji tidak dinyatakan dalam Jadual tersebut. Kedua, kepala tajuk di atas Klausa Penggadai Janji memberikan kenyataan terbatas seperti berikut: 'The following clauses and warranties are only applicable when specified in the Schedule.' Memandangkan Klausa Penggadai Janji tidak ditetapkan dalam Jadual itu maupun dalam
D senarai, ia tidak membentuk sebahagian daripada polisi tersebut (lihat perenggan 43–45).

(4) Sebagai pemegang debentur, Bank tersebut menjadi pemiutang bercagar Lampak tetapi perlu ditekankan bahawa apa yang diberikan sebagai cagaran oleh Lampak adalah aset-asetnya dan bukan papan kayu balak responden.
E Wang insurans mewakili barangan yang musnah akibat kebakaran itu dan hanya pemilik barangan tersebut berhak kepada wang insurans itu kerana polisi insurans adalah suatu indemniti (lihat perenggan 59); *Maurice v Goldsbrough Mort and Co Ltd* [1939] 3 All ER 63 diikut.

(5) Memandangkan wang insurans itu bukanlah milik Lampak tetapi responden
F sebagai pemilik barangan yang musnah akibat kebakaran itu, pembayaran wang insurans kepada responden bukanlah bayaran utama untuk hutang yang perlu dibayar kepada pemiutang tidak bercagar (lihat perenggan 60). Oleh itu mahkamah memberikan jawapan positif kepada Soalan (1) dan jawapan negatif kepada Soalan (2) (lihat perenggan 61).]

G **Notes**

For cases on construction of policy, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 99–100.

For cases on existence of trusts, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2316–2319.

H **Cases referred to**

Ainsbury v Millington [1987] 1 All ER 929 (refd)

Castellain v Preston & Ors [1883] 11 QBD 380 (refd)

Commonwealth Construction Co Ltd v Imperial Oil Ltd [1976] 69 DLR [3d] 558 (refd)

I *E Dibbens & Sons Ltd, Re (in liq)* [1990] BCLC 577 (refd)

General Accident v Midland Bank [1940] 2 KB 388 (refd)

Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd [1987] 1 MLJ 257 (refd)

Hepburn v A Tomlinson (Hauliers) Ltd [1966] AC 451 (refd)

Kim Guan & Co Sdn Bhd v Yong Nyee Fan & Sons Sdn Bhd [1983] 2 MLJ 8 (refd)
Knight v Knight [1840] 3 Bear 148 (refd)
Lombard v MRMA Insurance [1969] 1 Lloyd's Rep575 (refd)
Lonsdale & Thomson Ltd v Black Arrow Group Spk & Anor [1993] 3 All ER 648 (refd)
Lucena v Craufurd [1806] 2 Bos & Pul (NR) 269 (refd)
Maurice v Goldsbrough Mort and Co Ltd [1939] 3 All ER 63 (folld)
Petrofina (UK) Ltd & Ors v Magnaload Ltd & Ors [1983] 3 All ER 35 (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)
Yong Nyee Fan & Sons Sdn Bhdv Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182 (refd)
Walkers, The London and North Western Railway Co v Glyn [1859] 1 EL & EL 652 (refd)
William Waters Waters and Barnabas Steel v The Monarch Fire and Life Assurance Company [1856] 5EL & BL 870 (refd)
Woolcott v Sun Alliance [1978] 1 Lloyd's Rep 629 (refd)

Legislation referred to

Contracts Act 1950 s 24(b)
Evidence Act 1950 s 92
Malaysian Timber Industry Board (Incorporation) Act 1973 s 13

Appeal from: Civil Appeal No A–02–648 of 1997 (Court of Appeal, Putrajaya)

Dato' Cecil Abraham (Nad Segaran, Sunil Abraham and Leong Koh Keong with him) (Kean Chye & Sivalingam) for the appellant.
Ahmad Moosdeen (P Paramjothy with him) (Chan, Moosdeen & Partners) for the respondent.

Siti Norma Yaakob FCJ (delivering judgment of the court):

[1] In the High Court, the respondent's claim for a declaration that the appellant ('the Bank') holds a stated amount of monies as a trustee for the respondent was dismissed with costs.

[2] The Court of Appeal however disagreed with the High Court, overturned the decision of the latter and entered judgment for the respondent.

[3] Subsequently this court granted leave to the Bank to pose the following questions of law for our determination:

(1) whether under Malaysian law a trust may arise and be relied on as a cause of action against another party when the following requirements are absent;

   (a) there is no intention to create a trust for any person at the time of the execution of the Insurance Policy;

   (b) the element of certainty of subject matter is not proven;

   (c) the identity of the beneficiary of the trust is absent at the material time of execution of the contract of insurance;

(2) whether evidence of an oral agreement with a third party can in the context of law of trust and equity be adduced to contradict and deny the existence of a clear written agreement;

(3) whether and in what circumstances a trust can be created in favour of a purchaser of goods pursuant to an ordinary contract for the sale of goods and whether and to what extent such a trust can be enforced as against secured creditors of the vendor;

(4) if such a trust may be created as set out in paragraph 3 above, whether the same may be enforced as against a third party who is not a party to the contract of goods and who has no notice of any such trust;

(5) whether the effect of a Mortgage Clause in a fire insurance policy covers a third party and imposes a trust on the mortgage for the benefit of a purchaser of a contract for the sale of goods who is not intended to be a beneficiary under the said policy;

(6) whether the purchaser under a contract for the sale of goods, if proven to be beneficially entitled to any monies paid by an insurer to a mortgage, will be entitled to preferential ranking over the mortgagee who is a secured creditor by virtue of being a debenture holder when the debenture holder was first in time in terms of any beneficial interest in the insurance monies;

(7) to what extent is it possible for a beneficiary to a trust to trace into proceeds in the hands of a third party who is a stranger to such a trust.

The chronology of events leading to the filing of the respondent's claim happened in the following manner.

[4] On 6 November 1984, a company known as Lampak (M) Timber Sdn Bhd ('Lampak') borrowed monies from the Bank as capital to manage its sawmilling business and by way of security, Lampak created fixed and floating charges of all its assets by way of a debenture. By cl 9(i)(a) of the debenture, both Lampak and the Bank had to insure all materials, stocks-in-trade, other properties and assets covered by the debenture against loss or damage by fire. Both parties executed a joint fire insurance policy dated 4 March 1985, with Hong Leong Assurance Sendirian Berhad ('Hong Leong') for the insured sum of RM1m. The insured sum was subsequently revised to RM2m.

[5] At all material times, Lampak was in the business of buying and selling sawn timber at a sawmill located at the 11¼ mile Jalan Kuala Kangsar, Chemor, Perak, which was owned by another company known as Foong Seng Fuat Sawmill Sdn Bhd ('Foong Seng Fuat').

[6] It is the respondent's case that before 14 June 1985, it had entered into various contracts with Lampak for the purchase of sawn timber to the total value of RM597,152.39 and that amount had been tendered to Lampak. However before Lampak could make delivery, a fire broke out at the sawmill on 14 June 1985, that completely destroyed all the sawn timber purchased by the respondent.

[7] Following the fire, three civil suits were filed by the various parties who had suffered losses. A

[8] The first is Ipoh High Court Civil Suit No 2300 of 1985 filed by the Bank and Lampak jointly against Hong Leong claiming RM2m under the fire insurance policy. By a consent judgment dated 8 October 1986, Hong Leong was ordered to pay the Bank and Lampak RM700,000 in full and final settlement of their claims of which RM607,018.49 was apportioned to the Bank and the balance of RM92,981.51 to Lampak. B

[9] Following this, Ipoh High Court Civil Suit No 1543 of 1985 was filed by the respondent against Foong Seng Fuat and Lampak (the second suit) for non-delivery of the sawn timber and claiming the return of the sum of RM597,152.39 being the purchase price paid by the respondent to Lampak for the sawn timber. The respondent obtained judgment in default of appearance against Lampak on 13 January 1986 and partial judgment against Foong Seng Fuat on an O 14 application based on six written contracts of sale and purchase entered into by the respondent with Foong Seng Fuat. The respondent only managed to recover RM57,956.56 from Lampak leaving a balance of RM539,195.83 ('the balance sum') still due and owing to the respondent. Lampak has since been wound up. So has Foong Seng Fuat. C D

[10] The Bank has already received its apportioned sum of the insurance money from Hong Leong pursuant to the consent judgment in the first suit. In the third suit, Ipoh High Court Civil Suit No 22–41 of 1987 on which this appeal is founded and filed by the respondent against the Bank on 26 March 1987, the respondent seeks to trace the balance sum due from Lampak to the insurance money now is the hands of the Bank on the basis that the Bank holds such unpaid balance on trust for the respondent and consequently seeks its return with interests. E F

[11] As this appeal relates to a tracing exercise, I need to go back to determine the circumstances under which the respondent became entitled to be paid the balance sum which it now seeks to enforce against the appellant who is not the respondent's debtor. Lampak is. For this, I need to refer to the findings of the High Court and the Court of Appeal in the second suit. G

[12] In those proceedings, the respondent had sued Lampak and Foong Seng Fuat for non-delivery of the sawn timber by claiming the return of the purchase price which the respondent had paid to Lampak. In dismissing the respondent's claim, the High Court made the following findings: H

(1) the respondent's contract was with Foong Seng Fuat;

(2) there was no privity of contract between the respondent and Lampak;

(3) oral evidence could not be used to vary the terms of the respondent's written contracts with Foong Seng Fuat as this is prohibited by s 92 of the Evidence Act 1950; I

(4) Lampak is not the agent of Foong Seng Fuat and that the arrangements reached between the respondent and Lampak though contractual in nature are illegal and unlawful under s 24(b) of the Contracts Act 1950 as they contravene s 13 of the Malaysian Timber Industry Board (Incorporation) Act 1973;

(5) as there is no contractual nexus between the respondent and the appellant no trust exists between them.

[13] The Court of Appeal however allowed the respondent's appeal and reversed these findings of the High Court after reviewing the following evidence:

(1) that the respondent had paid the purchase price of the sawn timber to Lampak. This is evidenced by nine (9) cheques issued by the respondent to Lampak;

(2) that the written contracts between the respondent and Foong Seng Fuat are silent as to the appointment of Lampak as an agent for Foong Seng Fuat;

(3) that the actual party operating Foong Seng Fuat's sawmill was Lampak. One Gan Thian Beng was the person directly running the operation of the sawmill for Lampak;

(4) that Lampak paid for the services of the timber graders who graded the sawn timber purchased by the respondent and who prepared grading summaries on Mr Gan's instructions;

(5) that the various invoices were issued under Lampak's letterhead whilst the corresponding payment vouchers came from the respondent in favour of Lampak.

[14] From the above evidence, the Court of Appeal arrived at the following findings:

(1) Lampak was an agent of Foong Seng Fuat and in that capacity negotiated for the written contracts with the respondent on behalf of Foong Seng Fuat.

(2) Alternatively, the arrangements between the respondent and Lampak establish a contractual relationship between them resulting in the creation of an oral collateral contract existing side by side with the written contracts entered into between the respondent and Foong Seng Fuat.

(3) The fire destroyed the respondent's sawn timber in the sawmill.

(4) Section 92 of the Evidence Act 1950, is not applicable as the oral evidence introduced by the respondent was to establish the existence of an independent oral agreement it had with Lampak and not to vary the written agreements it had with Foong Seng Fuat.

(5) Section 13 of the Malaysian Timber Industry Board (Incorporation) Act 1973, has no application to the facts of this appeal and the issue of the oral agreement being illegal under s 13 is a non issue. In fact this issue on illegality was not pursued by the Bank.

(6) The Schedule in the insurance policy makes provisions for the sawn timber purchased to be held on trust for the respondent and as such the respondent

has a beneficial interest on the insurance money paid to the Bank, relying on the authorities of the Privy Council's decision in *Maurice v Goldsbrough Mort and Co Ltd* [1939] 3 All ER 63 and the House of Lord's decision in *Hepburn v A Tomlinson (Hauliers) Ltd* [1966] AC 451.

[15] As the respondent's case is dependent on the commercial dealings it had with Lampak, the Bank questioned the Court of Appeal's decision in setting aside the finding of fact made by the High Court that there was no contractual relationship binding the respondent to Lampak.

[16] In reversing the High Court finding, the Court of Appeal relied on the undisputed evidence gleaned from the documents that were produced. Athough the sawmill belonged to Foong Seng Fuat, it was however operated by Lampak. This fact is borne out by paragraph 5 of the statement of claim in the third suit. The respondent had also called as witnesses the timber graders who did the grading exercise of the sawn timber it purchased and they testified that they were employed and paid by Lampak. They produced the grading summaries they prepared which are attached to Lampak's invoices and the payment vouchers issued by the respondent showing that such invoices were addressed to Lampak and the cheques issued in payment were cleared by the Bank with whom Lampak operated an account. The monthly statements issued by the Bank confirmed this.

[17] The Court of Appeal relied on this documentary evidence to infer the existence of an oral agreement between the respondent and Lampak. I see nothing disturbing in that finding as the respondent is free to enter into as many contracts as it wishes with any party who is prepared to contract with it.

[18] The documents that I have referred to are contemporary documents, and their evidential value has long been recognized by this court in *Yong Nyee Fan & Sons Sdn Bhdv Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182 when it made the following statement:

> It has been said time and time again that an appellate court should not lightly differ from the trial judge's findings of fact or his rating of credibility of the witnesses whom he had the distinct advantages of seeing and hearing in the witness box. If it is a matter of credibility, then this court would long hesitate before it purported to overrule the findings of the trial judge and even then it would be skating on thin ice. But perhaps fortunately for the appellants, it is not a matter of credibility but it is a *matter of inferences to be drawn from the evidence*. And in such a matter, an appellate court is in as good a position as the trial court.

[19] The judgment goes further to state as follows:

> Where, as here, *the contemporary records* were not shown to be other than correctly written up in the ordinary course of business, *they must be preferred* to the oral evidence of witnesses with an interest of their own to serve, more particularly so where the oral testimony was in itself so clearly inconsistent and unreasonable. (Emphasis added.)

[20] The Privy Council upheld that finding, as seen from *Kim Guan & Co Sdn Bhd v Yong Nyee Fan & Sons Sdn Bhd* [1983] 2 MLJ 8 and had again emphasized the

weight to be given to contemporary documents in *Grace Shipping Inc & Anor v CF Sharp & Co (Malaya) Pte Ltd* [1987] 1 MLJ 257. See also the decision of this court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 where the same principles of law on contemporary documents were pronounced.

[21] The Bank did not challenge the contemporary documents introduced by the respondent. Instead it relied on s 92 of the Evidence Act 1950, to say that the contemporary documents giving rise to the oral agreement cannot be used to vary the written agreements entered into by the respondent with Foong Seng Fuat.

[22] This contention, I say, is erroneous as the facts establish the existence of two separate independent agreements between different contracting parties.

[23] On one hand, there are the written contracts executed by the respondent with Foong Seng Fuat and on the other the oral agreement made by the respondent with Lampak. That is not the situation envisaged by s 92 as it states that 'no evidence of an any oral agreement or statement shall be admitted *as between the parties to any such instrument* or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms.' (Emphasis added.) To that extent the Court of Appeal was justified when it ruled that s 92 has no relevance to the facts of this appeal.

[24] I shall now deal with all the issues pertaining to the fire insurance policy and to the Bank's submissions that:

(1) the respondent is not entitled to the insurance money as the policy does not cover the respondent's sawn timber.

(2) the respondent is not insured under the policy as the Bank and Lampak never intended to insure the respondent's sawn timber.

(3) the policy is meant to cover the Bank's mortgage interest only.

[25] Case law has established that a fire insurance policy, like the one in this appeal, is strictly an indemnity and has been defined aptly by Brett LJ in *Castellain v Preston & Ors* [1883] 11 QBD 380 to be as follows.

> The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong

[26] The policy that is before us now, is meant therefore to compensate the owner of the goods covered by the policy which were destroyed by the fire. The insurance money represents the goods destroyed by the fire and it therefore belongs to the owner of the goods even though he is not a party to the policy. A case in point is

William Waters Waters and Barnabas Steel v the Monarch Fire and Life Assurance Company [1856] 5EL & BL 870. In that case, the plaintiffs who stored their customers' goods in their warehouse, had a fire insurance policy which covered their own goods in the warehouse and 'goods in trust or on commission therein'. After a fire destroyed the warehouse, the plaintiffs claimed against the insurance company for their own goods and their customers' goods stored in the warehouse. The insurance company agreed to pay for the plaintiffs' goods but not for the customers' goods on the ground that the plaintiffs, not being the owners of the goods, had no insurable interest in them. The Court said as a matter of construction, the policy covered the customers' goods as well and the plaintiffs were entitled to claim for them but must pay the insurance money to the customers who suffered the loss and until such payment, the plaintiffs held the insurance money in trust for the owners.

[27] The same principle of law enunciated in *Waters* was confirmed by the House of Lords in *Hepburn* where the facts disclose that the plaintiffs hired out their lorries to a third party to carry the third party's goods. The plaintiffs had an insurance policy insuring their lorries and the third party's goods. The lorries with the goods were hijacked but it was not accepted that the plaintiffs were not negligent. The insurance company agreed to pay for the plaintiffs' lorries but not the goods as it claimed that the plaintiffs, not being the owners of the goods, had suffered no loss and they (not being negligent) were not liable to the owners of the goods. Applying the principle in *Waters*, the House of Lords held the plaintiffs could recover for the loss of the goods but must pay the insurance money to the owners of the goods.

[28] The Bank has also submitted that it never intended to insure the respondent's sawn timber and as such the respondent is not a beneficiary under the policy.

[29] That same submission was made and was responded to by Lord Pearce in Waters in the following manner:

> My Lords, it is a question of construction whether the policy in this case covered the whole proprietary interest in the goods or only the plaintiffs' liability to the owners in respect of them. That question must be answered by construing the words of the policy and, in the case of ambiguity, by considering any surrounding circumstances that may properly be called in aid. Here the matters that are expressed or implied in the document are clear, and there is nothing in the surrounding circumstances that can, or should, throw light on it. Certainly the unilateral intention of the assured cannot be used in deciding the mutual intention of the parties as disclosed in the document.

[30] The judgment ended as follows.

> The only issue, therefore, was one of construction, namely, did the policy cover the whole property in the goods. Any discussion of the unilateral intention of the assured was irrelevant.

[30] *Hepburn* expressed the same sentiments with the following statement.

> There is, in my judgement, no rule which would make it relevant in this case to go behind the words of the policy and investigate the respondents' intention when they took out this policy.

[31] Based on the authorities cited, my answer to the Bank's objection is that intention is not a relevant consideration. What the policy covers must be gathered from the terms of the policy and if it insures third party goods, the insurance money cannot be kept by the insured who suffered no loss but must be paid to the third party who suffered the loss. Further in *Waters, The London and North Western Railway Co v Glyn* [1859] 1 EL & EL 652, *Maurice* and *Hepburn*, the third parties were not named in the policies. All the same, the courts ruled that the insured must pay the insurance monies to them. This further strengthens the fundamental principle of insurance that it is an indemnity.

[32] The joint insurance policy executed by the Bank and Lampak with Hong Leong identifies the property insured to be those described in the Schedule and this is spelt out as follows.

> The Property Insured::
>
> On the following properties belonging to the insured or held in trust or on commission or on joint account with others and for which the insured is responsible, whilst contained in the building located at the situation mentioned above occupied as SAWMILL FACTORY.'
>
> Item No
>
> 1 On All Materials and Stock-in-Trade consisting mainly of sawn timber and logs in connection with the Insured's Trade contained within the premises compound. (Emphasisadded.)

[33] The Schedule also mentions that the coverage is subject to the clauses contained in a list that includes a contract price clause which reads as follows:

> It is hereby agreed and declared that in respect only of *goods sold but not delivered* for which the Insured is responsible and with regard to which under the Conditions of Sale, the Sale Contract is by reason of Fire, or any perils hereby insured against, cancelled, either wholly or to the extend of the lesser damage, the liability of the Insurers shall be based on the Contract Price and for the purpose of Average the value of all goods to which this Clause would be in the event of loss or damage be applicable shall be ascertained on the same basis. (Emphasis added.)

[34] From my reading and understanding of the phrase 'held in trust' in the Schedule coupled with the Contract Price Clause, the goods insured must necessarily include third party's goods, ie the respondent's sawn timber. As was pointed out in the case of *The London and North Western Railway Company*, if it had been intended that only the insureds' own goods should be insured why was there the necessity to have the further words added. In that English case, the policy covered 'goods their own and in trust for others'.

[35] The property belonging to the insured or those held on trust on the premises were insured by Lampak and the Bank. The issue raised is whether the insurance policy taken out is a joint or a composite policy. A

[36] In *Colinvaux's Law of Insurance*, the author had this to say in paragraph 3-44 p 79. B

> The preceding paragraphs considered the case in which a policy had been taken out by one person or his own behalf, on behalf of another, or on behalf of himself and another. These situations must be distinguished from that in which there are two parties to a policy, each with an insurable interest. If the parties have an undivided interest in the insured subject matter — normally in the form of joint ownership — and their interests are covered by a single policy, that policy is said to be Joint. By contrast, if the interest of the parties are different (as in the case of mortgagor and mortgagee, landlord and tenant, and hirer and owner of goods), and their interests are insured under a single policy, that policy is said to be composite. C

D

[37] There are some essential legal differences between a composite and a joint policy. A composite policy consists of a number of contracts in a single document, a breach of duty or misrepresentation of which does not affect the rights of an innocent composite assured. Therefore a false statement by a mortgagor will not affect the rights of the mortgagee (see *Woolcott v Sun Alliance* [1978] 1 Lloyd's Rep 629). A misconduct by one of the parties to a composite policy will not defeat the E rights of the other party (see *Lombard v MRMA Insurance* [1969] 1 Lloyd's Rep575). Again under a composite policy each party has a separate contract with the insurer and has to be paid individually. Further there is no joint risk; there is no joint interest; the measure of loss suffered by the two parties will be different, calling for a different measure of indemnity and there is no joint element on the property insured. F In *General Accident v Midland Bank* [1940] 2 KB 388 where an insurer, having made payment to three co-assureds under a composite policy, sought to recover its payment from two of them on the basis that the loss had been deliberately caused by arson. It was held that the insurer had to seek restitution from the party to whom it had made payment and could not recover the totality of its payments from any co-assured. G

[38] On the contrary, in a joint policy if one assured has been guilty of misrepresentation or of some breach of duty, neither can recover. Secondly, a deliberate destruction of the insured subject matter by a joint assured person will prevent any recovery under the policy. Further, the rights of the individual assureds H under a composite policy are independent whereas in a joint policy the rights of the assureds are indivisible and will stand or fall together.

[39] The instant policy before us was taken by the Bank and Lampak, the co-assureds. The Bank may have an insurable interest in respect of part of the I property in the sawmill sufficient to cover the amount of the loan or sum owed by Lampak. That being so, the Bank should have taken a separate policy to cover that interest. This was never done. Would the presence of moral certainty of loss or detriment of the property sufficient to give the Bank an insurable interest over the property? *The Law of Insurance* (3rd Ed) by Poh Chu Chai at p 9 states that:

A moral certainty of loss arising from the destruction of the property insured is not sufficient to give an insured an insurable interest in the property insured.

[40] In *Lucena v Craufurd* [1806] 2 Bos & Pul (NR) 269, Lawrence J said:

> The plaintiff contented that a person may be said to be interested in the preservation of a thing it he was so situated with respect to it as to benefit from its existence or be prejudiced by its destruction. If there was a moral certainty that the person would suffer a loss arising from the destruction of the property insured, he has an insurable interest in the property.

[41] The argument was struck down by their Lordships on appeal on the ground that to constitute an insurable interest the person insuring the property must have a legal or an equitable interest in the property insured.

[42] Since the Bank had no insurable interest over the property, it had chosen not to take a separate policy. Thus, when the property was destroyed by the fire and the sum paid to the Bank, a trustee, it should hold such sum of money on trust.

[43] By contrast can it be said that the policy in this appeal covers the Bank's interest as a mortgagee, by virtue of the presence of the Mortgagee Clause in the policy? I do not think so for two reasons. Firstly, the Bank's interest as a mortgagee is not stated in the Schedule. Secondly, the heading immediately above the Mortgagee Clause makes a qualifying statement that reads as follows:

> The following clauses and warranties are only applicable when specified in the Schedule.

[44] Since the Mortgagee Clause is not specified in the Schedule nor included in the list, I consider that it does not form part of the policy. In any event, the Mortgagee Clause spells out certain rights and warranties which the mortgagee has over the mortgage and has nothing to do with the coverage. In *Woolcoot*'s case, the defendant insurers effected for the plaintiff, an insurance covering the plaintiff's house 'Greenacre' together with all risks for a total consideration of @20a432,500. The property and contents were destroyed by fire. The defendant, while admitting the policy, the fire and the resultant loss, contended that they were not liable to the plaintiff because of the failure by the plaintiff to disclose his criminal record in his proposal for insurance. For this reason, I find that the policy before us is not the same type of policy that was in *Woolcoot*.

[45] I now come to the Court of Appeal's finding that the Bank pay the insurance money to the respondent as it holds such money in trust for the respondent. The Bank says that such a finding is erroneous as the following three certainties required for the creation of a trust are absent:

(1) there is no intention to create a trust for any person at the execution of the insurance policy;

(2) the element of certainty of the subject matter is not proven;

(3) the identity of the respondent as a beneficiary of the trust was absent at the time the contract of insurance was entered into.

[45] *Waters* addressed that same point and declared that the ordinary meaning be given when reference is made to a trust of the goods and insurance money. For practical purposes this means nothing more than the holding or entrustment of the insurance money for the party entitled to it and which is referred by the Bank to be a commercial trust. To that end, it should not be interpreted to mean a trust in the strict technical sense as it is understood in courts of equity. As such, it is not the type of trust envisaged by *Knight v Knight* [1840] 3 Bear 148. Perhaps I can emphasise that better by quoting the relevant passage in the judgment of Lord Campbell CJ:

> What is meant in those policies by the words 'goods in trust?' I think that means goods with which the assured were entrusted; not goods held in trust in the strict technical sense, so held that there was only an equitable obligation on the assured enforceable by a subpoena in Chancery, but goods with which they were entrusted in the ordinary sense of the word.

[46] I have in the course of my judgment relied heavily on the relevant principles of insurance law expressed in *Hepburn* and *Maurice*, which the Bank maintained is misplaced as the two authorities apply to bailment cases and not to sale of goods cases.

[47] I consider that such a contention to be unfounded for the same reason given in *Lonsdale & Thomson Ltd v Black Arrow Group Spk & Anor* [1993] 3 All ER 648:

> It is true that a bailee has a rather special status in English law, having in many respects the rights of an owner as against third parties. But the decisions in *Waters v Monarch Fire and Life Assurance Co*, *London and North West Rly Co v Glyn* and *Hepburn v A Tomlinson (Hauliers) Ltd* do not turn on any principle peculiar to the law of bailment. Similar principles apply to insurances in quite different fields. I have already given trustees as one example. Another is the case of a trade union which insures the property of its members against burglary. It may recover the value of the stolen property, accounting for it to its members: *Prudential Staff Union v Hall* [1947] KB 685. A third is the case of the shipowner who sells his ship but undertakes to keep the insurance on foot and assigns the benefit of it to the purchaser. The law might have been that if a loss subsequently occurs, the insurer is not liable because his assured has not suffered any and the assignee can have no better right that he had.

[48] Additionally the principle in *Hepburn* and *Maurice* have been applied to non bailment cases as well. One such case is *Petrofina (UK) Ltd & Ors v Magnaload Ltd & Ors* [1983] 3 All ER 35 where the insurance policy covers the works of the main contractor of a building or engineering contract as well as the works of his sub-contractors and it was held that the sub-contractors could claim the benefits of the policy although not parties to the policy, a decision based on the principle of law enunciated in *Waters* and *Hepburn*.

[49] Petrofina (UK) was applied by the English Court of Appeal in *Glengate-KG Properties Ltd v Norwich Union Fire Insurance Society Ltd & Ors* [1996] 2 All ER 487 which concerns the insurance of a property development and architect drawings.

[50] The principle in *Waters* and *Hepburn* has also been applied by the Supreme Court of Canada in *Commonwealth Construction Co Ltd v Imperial Oil Ltd* [1976] 69 DLR [3d] 558 to an insurance policy concerning a building contract.

[51] From the authorities I have cited, it is clear that the principle of law decided by *Waters* and *Hepbur*n is not limited to cases of bailment only.

[52] I now come to the case of *Re E Dibbens & Sons Ltd (in liq)* [1990] BCLC 577 which the Bank submits should have been considered by the Court of Appeal. In that case, the company, E Dibbens & Sons carried on the business of storing furniture. It took out an insurance policy which described the goods covered by the policy as 'GOODS IN TRUST, mainly furniture and Household goods'. That referred to goods that the company stored for reward in its warehouse. Some of the customers had specifically requested that the company obtain insurance for them while others had not. One of company's warehouses was destroyed by fire and the company was put into creditors' voluntary winding up. The liquidator sought the determination by the court of the manner in which he was to distribute the moneys payable under the insurance policy.

[53] Harman J ordered the liquidator to pay only the customers who had agreements with the company to insure their goods. In the course of his judgment, the learned judge was critical of the principle of law enunciated by *Walters, London and North Western Railway Co* and *Hepburn* relating to the interpretation of the trust embodied in an insurance policy. He had instead found that a fiduciary obligations arose on the request to the company for insurance followed by the payment to the company of amounts of money for that insurance but an automatic trust did not arise on the mere deposit of furniture in the warehouse.

[54] I have my reservations on *Re Dibbens* as it was decided by a court of first instance whereas *Hepburn* is a House of Lord's decision and *Maurice*, a Privy Council decision. To accept *Re Dibbens* as being more authoritative than *Hepburn* and *Maurice* is to acknowledge a decision of a lower count overruling the decision of the most superior court of the land. That is not acceptable as it goes against the very concept of stare decisis. Moreover, *Hepburn* and *Maurice* have been readily applied in many cases after *Re Dibbens* and these include *Lonsdale & Thompson Ltd v Black Arrow Groupple and another* decided in 1993 and the Court of Appeal case of *Glengate* decided in 1996.

[55] After giving *Re Dibbens* my utmost consideration, I cannot accept that case to be the authority that the Bank can keep the insurance money as it is not the owner of the goods destroyed by the fire. I cannot overrule the basic principle that the insurance policy is an indemnity and it is only applicable to a party who has suffered loss and is entitled by law to be indemnified of his loss.

[56] There is also the submission made by the Bank that the tracing order made by the Court of Appeal has the effect of giving priority to an unsecured creditor, the respondent, to take precedence over a secured creditor, the Bank.

[57] As a debenture holder, the Bank became Lampak's secured creditor but it must be emphasized that what was pledged as security by Lampak was its assets and not the respondent's sawn timber. On the authority of *Maurice*'s case, the insurance money represents the goods destroyed by the fire and only the owner of such goods is entitled to the insurance money as the insurance policy is an indemnity.

[58] Since the insurance money does not belong to Lampak but to the respondent as the owner of goods that were destroyed by the fire, the payment of the insurance money to the respondent is not, I consider, to be a preferential payment of a debt due to an unsecured creditor.

[59] At the beginning of my judgment, I had listed the seven questions of law to be determined by us. Based on what I have expressed in this judgment I give a positive yes to Question (1) and a negative no to Question (2).

[60] As for the remaining Questions (3) to (7), I find them to be overlapping, abstract and academic and I decline to answer them. In this respect, I am guided by a decision in the case of *Ainsbury v Millington* [1987] 1 All ER 929, where it was held that 'courts decide disputes between parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.'

[61] Since I find no reason to disagree with the Court of Appeal's decision dated 15 January 2001, this appeal is dismissed with costs and the deposit is to be paid out to the respondent to account of its taxed costs.

[62] My learned brothers, Abdul Malek Ahmad PCA and Steve Shim CJ (Sabah and Sarawak), who have had sight of this judgment in draft concur with the reasons given, the conclusions reached and the orders to be made.

Appeal dismissed.

Reported by Loo Lai Mee